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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

SUNBELT CHLOR ALKALI PARTNERSHIP)

Complainant)

v.)

NORFOLK SOUTHERN RAILWAY COMPANY)

and)

UNION PACIFIC RAILROAD COMPANY)

Respondents.)

Docket No. NOR 42130

**MOTION OF SUNBELT CHLOR ALKALI PARTNERSHIP FOR LEAVE TO FILE A
REPLY TO DEFENDANT NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY
TO DEFENDANT UNION PACIFIC RAILROAD COMPANY'S MOTION FOR
PARTIAL DISMISSAL OR, IN THE ALTERNATIVE, EXPEDITED DETERMINATION
OF JURISDICTION OVER CHALLENGED RATES**

Complainant, SunBelt Chlor Alkali Partnership ("SunBelt"), hereby requests leave to file the attached "Reply of SunBelt Chlor Alkali Partnership to Defendant Norfolk Southern Railway Company's Reply To Defendant Union Pacific Railroad Company's Motion for Partial Dismissal or, in the Alternative, Expedited Determination of Jurisdiction Over Challenged Rates," attached hereto as Attachment 1. The Board's rules at 49 C.F.R. 1104.13(c) state that "[a] reply to a reply is not permitted." Equitable considerations require that the Board waive that rule due to the procedural distinctions posed by the instant situation.

This proceeding involves a Complaint filed by SunBelt against both Union Pacific Railroad Company ("UP") and Norfolk Southern Railway Company ("NS") that challenges the reasonableness of their interline rates for a through movement from McIntosh, AL to La Porte, TX, via interchange at New Orleans, LA. On September 26, 2011, UP filed a "Motion for Partial Dismissal or, in the Alternative, Expedited Determination of Jurisdiction Over Challenged

Rates" ("UP Motion"). SunBelt filed its Reply in opposition on December 6, 2011 ("SunBelt Reply"). On December 13, 2011, NS filed a reply in support of the UP Motion ("NS Reply"). Moreover, on that same date, NS published a new tariff that changed the challenged NS proportional rate to a local rate. That change in the NS rate structure provides the entire basis for NS's support of the UP Motion.

The Board's standard procedural schedule for motions anticipates that there is a moving party and an opposing party. In a multi-party proceeding such as this one, however, where the third party (NS) files a reply in support of the moving party (UP), the Board's standard procedures deny the opposing party (SunBelt) any opportunity to respond to the arguments of the third party. Although this reason alone is sufficient to permit SunBelt to reply to the NS Reply, in this case, NS also has changed the facts to which the SunBelt Reply was addressed. Therefore, SunBelt should be afforded the opportunity to address the new facts upon which the NS Reply is predicated.

For the foregoing reasons, SunBelt requests leave to file the reply to the NS Reply, attached hereto as Attachment 1.

Respectfully submitted,



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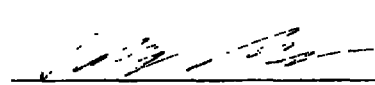
I hereby certify that I have caused the foregoing pleading to be served by both electronic mail and first class mail, this 19th day of December 2011, on:

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Attachment 1

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

SUNBELT CHLOR ALKALI PARTNERSHIP)

Complainant)

v.)

NORFOLK SOUTHERN RAILWAY COMPANY)

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Docket No. NOR 42130

**REPLY OF SUNBELT CHLOR ALKALI PARTNERSHIP TO
DEFENDANT NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY TO
DEFENDANT UNION PACIFIC RAILROAD COMPANY'S MOTION FOR PARTIAL
DISMISSAL OR, IN THE ALTERNATIVE, EXPEDITED DETERMINATION OF
JURISDICTION OVER CHALLENGED RATES**

Complainant, SunBelt Chlor Alkali Partnership ("SunBelt"), hereby submits this Reply to Defendant Norfolk Southern Railway Company's ("NS") December 13, 2011 Reply To Defendant Union Pacific Railroad Company's ("UP") September 26, 2011 "Motion for Partial Dismissal or, in the Alternative, Expedited Determination of Jurisdiction Over Challenged Rates" (hereinafter the two documents are referred to respectively as "NS Reply" and "UP Motion"). SunBelt filed its Reply in opposition to UP's Motion on December 6, 2011 ("SunBelt Reply"). By separate "Motion for Leave to File a Reply to a Reply" filed contemporaneously with this Reply, SunBelt has asked the Board to accept this Reply due to the procedural posture of UP's Motion whereby NS has filed a reply in support of the Motion to which SunBelt otherwise would have no opportunity to respond.

I. NS CAN ONLY SUPPORT UP'S MOTION BY CHANGING ITS PROPORTIONAL RATE TO A LOCAL RATE.

Although NS supports UP's Motion, it does so not on the basis of the facts as they existed when UP filed its Motion, or when SunBelt filed its Reply, but on facts that NS subsequently created. Specifically, the facts addressed by UP's Motion and SunBelt's Reply are that, for the issue movement from McIntosh, AL to La Porte, TX, NS had established a proportional rate for its segment from McIntosh to New Orleans, and UP had established a local rate for its segment from New Orleans to La Porte. NS, however, has now altered those facts for the purpose of its Reply by replacing its proportional rate with a local rate. Moreover, NS, for the purpose of this case only, agrees to replace its proportional rate with a local rate *nunc pro tunc* back to the original effective date of the proportional rate, in order to allege, incorrectly, that SunBelt is not prejudiced by this change in rate structure.¹ Without this modification to its rate structure, NS could not argue for separate evaluations of each rate factor. Indeed, NS effectively concedes this point throughout its Reply. See NS Reply at 14-18.²

The question presented by the UP Motion is whether market dominance must be evaluated separately for each segment or for the entire through movement. The NS Reply,

¹ NS Reply, p. 15. It is important to note that, in its Reply, NS cites no legal basis for replacing its proportional rate, which has been in effect since July 30, 2011, *nunc pro tunc* with a local rate that by the tariff's own terms is effective on January 2, 2012. See NS Reply, Exhibit A. NS simply says that it "will not object" to SunBelt's treating the NS Rule 11 rate that has been in place from July 30 to the present as a local rate for purposes of its rate challenge. But NS does not even attempt to provide a legal basis for effectively changing the explicit terms of its Rule 11 tariff retroactively.

² Throughout its Reply, the NS statements that local rates must be separately challenged are expressly predicated upon combinations of two local rates, without any discussion of a combination of local and proportional rates. *E.g.*, NS Reply at 14 ("Thus, in the context of rate challenges, the Board and its predecessor have distinguished (i) joint and proportional rates from (ii) combination rates constructed of two or more local rates."); 15 ("Thus, the rail transportation at issue in this case is currently governed by two separate local rates...."); 15-16 ("If SunBelt wishes to maintain a challenge to the two carriers' local rates, it must challenge each rate individually...."); 17 ("...the Board meant a local rate, such as those established by UP and by NS in the present case."); 17-18 ("Where a carrier has established a local rate and a shipper uses that rate in combination with another carrier's local rate,... a single challenge to the combined rate is not allowed."); 18 ("Because the common carrier rate established by each carrier is a local rate...neither NS nor UP is 'charging or collecting' a rate for the entire interline movement."). [underline added]

however, is schizophrenic in how it addresses this issue. At page 13, NS states that “[l]ocal rates must be challenged individually.” But, in the footnote that accompanies this statement, NS states that:

For purposes of rate reasonableness challenges, proportional rates are not distinguishable from joint rates: in both situations, a complainant may challenge only the entire through rate, not one or more component parts or factors of that through rate.

NS Reply at 13, n. 12. NS fails to reconcile these conflicting legal standards when the interline rate is a combination of a proportional rate with a local rate. While the UP Motion argues that the local rate standard applies, the SunBelt Reply contends that the proportional rate standard must prevail so as not to deprive the shipper of any regulatory remedy at all whenever the bottleneck carrier publishes a proportional rate and the non-bottleneck carrier publishes a local rate.³ NS attempts to make the conflict disappear by changing its proportional rate to a local rate *nunc pro tunc* to create a combination of local rates that can be separately challenged.

NS would not need to change its proportional rate to a local rate, or offer to apply its local rate retroactively, if it agreed with UP that SunBelt could separately challenge the NS proportional rate if UP were dismissed from this proceeding. The fact that NS did so indicates that NS agrees with Sunbelt that the combination of a local rate and a proportional rate requires a complainant to challenge the rates applicable to the entire movement together. Furthermore, by agreeing not to contest the propriety of SunBelt’s challenge to the proportional/local rate combination, but only for purposes of this case, NS effectively concurs in SunBelt’s supposition that, if UP is dismissed, SunBelt could not continue its rate challenge to just NS’s proportional

³ NS disingenuously argues that “[t]he Board should reject SunBelt’s invitation to evaluate whether UP possesses market dominance over the transportation to which UP’s *local* rate applies by reviewing whether UP and NS somehow have market dominance over an interline combination movement (governed by two separate local rates), one segment of which indisputably is not subject to that UP local rate.” *Id.* at 9-10 (italics in original; underline added; footnote omitted). SunBelt never made this argument in the context of two separate local rates; it presented this argument as to a combination of a proportional with a local rate.

rate. Indeed, NS explicitly “does not concede that an individual proportional rate may be separately challenged.” NS Reply at 3, n. 4.

This fact exposes the true reason why NS is willing to apply its local rate retroactively. NS does not want the Board to address the anomaly in the law that granting UP’s Motion would create by depriving shippers of any regulatory rate remedy for interline rates whenever the bottleneck carrier publishes a proportional rate and a non-bottleneck carrier publishes a local rate. See SunBelt Reply at 4-5. In order to eliminate that anomaly, the Board either must agree with SunBelt that a combination of a proportional and local rate must be challenged as a whole, or the Board must create a second bottleneck rate exception that permits shippers to separately challenge a proportional rate when used in combination with a local rate. NS would like to avoid any precedent that reaches either conclusion, because both conclusions would narrow the scope of the so-called “Bottleneck Rule.”⁴

Having exposed this anomaly, perhaps inadvertently, NS seeks to cover its tracks. Only by pretending that the proportional rate never existed can NS support the UP Motion. But having exercised its rate setting prerogative to establish a proportional rate, NS cannot avoid the consequences of its decision by changing the proportional rate to a local rate several months into this rate case and agreeing to apply the local rate retroactively. This is pure gamesmanship that

⁴ At present, the only expressly acknowledged exception to the “Bottleneck Rule,” which prohibits shippers from separately challenging proportional bottleneck rates, is the “contract” exception, which requires a shipper to first obtain a contract from the non-bottleneck carrier in order to separately challenge a proportional bottleneck rate. See SunBelt Reply at 5-6. The two solutions to the anomaly identified by SunBelt either would add a local rate exception or make potentially non-market dominant non-bottleneck carriers necessary parties to a rate case. Either solution would reduce the ability of railroads to manipulate their rate setting prerogative to discourage shippers from pursuing their regulatory remedies for unreasonable rates. In tacit recognition of the fact that there truly is no other legal solution to this anomaly, NS attempts to avoid the issue altogether by retroactively changing its rate structure.

must not be tolerated for the reasons stated in SunBelt's Motion for Clarification, which was filed contemporaneously with its Reply on December 6, 2011.⁵

II. THE NS CHANGE TO A LOCAL RATE NEARLY FOUR MONTHS AFTER THE COMPLAINT IMPROPERLY COMPLICATES THIS PROCEEDING TO THE PREJUDICE OF SUNBELT.

The NS modification of its rate structure in response to the SunBelt Reply highlights the potential for manipulation that SunBelt addressed in both its Reply, at 5-6, and its Motion for Clarification, at 3-4 and 6-7. SunBelt agrees with NS that, by changing its rate from a proportional to a local rate, NS has created a combination of two local rates that can be separately challenged. This is precisely the type of post-Complaint tinkering that prejudices rate case complainants because it substantially changes the scope of the SAC evidence.

Although NS claims to be simplifying this case by agreeing to apply its new local rate retroactively, that claim is a red-herring. NS Reply at 13, 15. NS has actually complicated a case that did not require simplification. Because both the joint rate and the proportional/local combination rate structures that had been in place since SunBelt began paying tariff rates are through rates that must be challenged as a whole—a fact that NS does not seriously contest—the parties needed only to submit SAC evidence based upon a single SARR for the entire through route for the entire period that the tariff rates applied. Therefore, SunBelt had no reason to object when UP and NS switched from a joint rate to a proportional/local rate combination

⁵ This would be the second time since SunBelt's contract expired that UP and/or NS have manipulated the interline rate structure of the issue movement for an ulterior objective. On March 31, 2011, when the contract expired, NS published a joint tariff rate for the issue movement. Just eleven days later, on April 11, 2011, NS took the unusual step of withdrawing its joint tariff rate and UP announced that it instead would publish the joint rate, even though the origin carrier typically does so. The only reason for taking this unusual step was to apply UP's tariff with a third party indemnity clause. That is the same indemnity clause that has since become the subject of STB Docket No. FD 35504, Union Pac. R.R. Co.—Petition for Declaratory Order (served Dec. 12, 2011). On April 27, 2011, UP petitioned the Board to initiate that proceeding on the basis of an allegedly "concrete dispute" with SunBelt over the lawfulness of that indemnity. Thus, it is clear that UP/NS manipulated the rate structure in order to create a controversy that might prompt the Board to grant UP's Petition. It is notable that the UP joint rate tariff was never applied to the issue movement, because the parties ultimately agreed to continue the NS tariff during their contract negotiations. When those negotiations faltered, UP elected instead to publish the local rate that is the subject of the UP Motion, and thereby still apply its tariff indemnity.

because that particular change in rate structure did not prejudice SunBelt's ability to obtain reparations from the effective date of the joint rate tariff because both rate structures could be addressed by the same SAC evidence. By switching to a local rate four months after the Complaint, however, NS has created the very complexity about which SunBelt protested in its Reply and Motion for Clarification, by establishing an interline rate structure that now requires SunBelt to pursue two rate cases in order to obtain reparations for the entire period that SunBelt has been shipping under a tariff.⁶ NS openly concedes this fact, but defers any explanation of why this does not prejudice SunBelt until its Reply to SunBelt's Motion for Clarification. NS Reply at 18-19.

The NS agreement to waive any objection to a SunBelt challenge to the previous proportional rate does nothing to address the four month period during which NS and UP charged SunBelt joint rates. SunBelt would have to file two separate rate cases if it wants to recover reparations for the issue movement during those four months. NS attempts to minimize this fact by arguing that SunBelt knew UP had published a local rate tariff four days before SunBelt filed its Complaint, even though the tariff was not effective until four days after the Complaint. NS Reply at 5, 19. But SunBelt's knowledge that UP was about to change the interline rate structure after four months ignores the fact that SunBelt was prepared to file its Complaint immediately upon expiration of the prior contract, but deferred such action in order to

⁶ NS disingenuously claims that SunBelt should not now be heard to oppose an NS local rate because this is precisely what it "has been so ardently urging the Board to require." NS Reply at 16, n. 15. SunBelt wanted a local NS rate before filing a rate case so that it could separately challenge the NS bottleneck rate. It is highly prejudicial to SunBelt for NS to grant SunBelt's wish after SunBelt has filed its Complaint against the UP/NS combination through rate, which now requires SunBelt to pursue two rate cases if it is to recover reparations for the entire tariff period.

continue negotiations with UP and NS. SunBelt made both UP and NS aware of this fact.⁷ NS, however, would penalize SunBelt for negotiating rather than litigating.

It is important to note that, because the structure of through rates is solely within the discretion of the railroads, UP and NS were in the best position to protect their interests by immediately publishing local rates rather than a joint rate during the extended contract negotiations, whereas SunBelt had no such ability to protect its interests except to immediately file its Complaint. If the Board desires to encourage shippers to exhaust negotiations before litigation, it should not penalize the shipper because the railroads announced their intention to change the rate structure, just as negotiations were faltering, in a manner that is prejudicial to the shipper's ability to recover reparations during the negotiation period.

If upon expiration of the SunBelt contract with NS and UP, both railroads had replaced the contract rate with a combination of local rates at that time, SunBelt would have had no objections because it would not have been prejudiced by a continuously changing rate structure. Its SAC evidence would be the same for the entire tariff period. But knowing full well at that time that SunBelt was seriously weighing a rate case, both railroads elected to continue the joint rate structure that existed in the contract. That joint rate remained the applicable rate for four months until UP elected instead to publish a local rate and NS responded by publishing a proportional rate, just as contract negotiations were faltering.

Although UP may have believed it was protecting itself from a rate challenge by switching to a local rate, it mistakenly concluded that it could do so despite the fact that NS published a proportional rate, not a local rate. Whether or not NS and UP unwittingly created this folly or were intentionally manipulating the process is irrelevant. NS's attempt to repair the

⁷ SunBelt made no attempt to hide the fact that it was prepared to file a rate Complaint during its negotiations with NS and UP. Indeed, SunBelt hoped that the prospect of a rate case might foster a negotiated settlement.

damage only by now changing its proportional rate to a local rate at SunBelt's expense is patently unfair.

As discussed in the SunBelt Reply, the combination of a proportional and a local rate is a through rate that must be considered as a whole because of the presence of the proportional rate. Although NS contends that its new local rate changes that dynamic in favor of UP's Motion, the Board should reject post-Complaint attempts by NS and UP to modify their interline rate structure in a way that is prejudicial to SunBelt. The Board should not countenance the "gaming" of the rate structure post-Complaint. Indeed, there is absolutely no assurance from either carrier that further gaming will not take place in the future during the pendency of the Complaint.

III. CONCLUSION.

For the reasons stated above, SunBelt respectfully requests that the Board deny UP's Motion, because market dominance must be evaluated for the entire through movement when UP's rate is combined with the NS proportional rate to create a through rate. The Board also should reject NS's attempt to alter this through rate structure post-Complaint. If the Board should decide to dismiss UP, it must clarify that SunBelt may continue its challenge to the NS proportional rate and set forth the legal basis for such challenge, or in the alternative, the Board should grant SunBelt's Motion for Clarification that the challenged rate structure is the joint rate that was in effect when SunBelt filed its Complaint.

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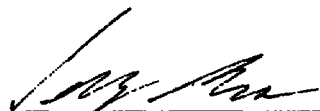
I hereby certify that I have caused the foregoing pleading to be served by both electronic mail and first class mail, this 19th day of December 2011, on:

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